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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JOHN DOE,)	Civil Action No.
)	
Plaintiff,)	COMPLAINT FOR
)	DECLARATORY AND
vs.)	INJUNCTIVE RELIEF
)	
REGENTS OF THE UNIVERSITY OF)	
)	
CALIFORNIA,)	
)	
Defendant.)	
)	
)	

1 Plaintiff John Doe alleges as follows:

2 **GENERAL ALLEGATIONS**

3 1. Plaintiff, a male student at the University of California at Santa Cruz
4 (UCSC), is a respondent in a campus administrative investigation by the UCSC Title
5 IX Office (“Title IX Office”) into allegations that he sexually assaulted a female
6 student (“Complainant”), at his off-campus residence on or about June 16, 2020.

7 2. Title IX of the Education Amendments of 1972 prohibits sex
8 discrimination in any educational program or activity receiving federal financial
9 assistance. On August 14, 2020, following an extensive period of review by the
10 United States Department of Education (“DOE”), amended Title IX regulations went
11 into effect. The amended regulations, titled “Nondiscrimination on the Basis of Sex
12 in Educational Programs or Activities Receiving Federal Financial Assistance” were
13 first published on May 19, 2020, and are found at 34 CFR part 106. The new
14 regulations amended the procedural framework for investigating campus sexual
15 assault allegations and granted new protections and enhanced due process for the
16 accused student. Enhanced procedural protections under the revised regulations
17 include, for example, enhanced discovery rights as well as the right to cross
18 examination of witnesses by each party’s advisor and the right to ask the other party
19 and any witnesses all relevant questions and follow-up questions at a hearing on the
20 allegations. In contrast, the procedures currently being followed by Defendant in the
21 pending administrative action against Plaintiff, do not provide significant discovery
22 rights to the parties, and expressly prohibit an advisor from any active participation in
23 the process.

24 3. In this case, Defendant Regents of the University of California, have
25 refused to apply the recent DOE amendments to the Title IX regulations, contending

1 that Plaintiff's case arose before August 14, 2020 and that the new federal Title IX
2 regulations are not retroactive. Instead, they are applying existing procedures that
3 violate procedural due process. If Plaintiff is forced to proceed under Defendant's
4 existing procedures, he faces the possibility of expulsion and or a lengthy suspension
5 without being afforded a hearing that complies with the requirements of the new
6 federal Title IX regulations or his rights to due process. This would irreparably harm
7 his education and future career opportunities.

8 **THE PARTIES**

9 4. Plaintiff is currently a PhD candidate at UCSC in the field of
10 Biomedical Sciences and Engineering. UCSC's program in this area is a top-notch
11 program with dozens of laboratories specializing in molecular biology, biochemistry,
12 and bioinformatics. Few other academic institutions in the world offer the
13 specialized program that Plaintiff has elected to study at UCSC

14 5. Plaintiff's field of study is highly specialized. Plaintiff specifically
15 enrolled at UCSC in order to avail himself of the unique opportunities offered by the
16 University. By refusing to afford Plaintiff appropriate and fair process, the University
17 is placing Plaintiff's educational and financial future at risk.

18 6. The Regents of the University of California ("Regents"). is the
19 governing body of the University of California, a public university system with over
20 280,000 students enrolled across ten campuses. UCSC is a public university located
21 in Santa Cruz, California and is part of the University of California statewide system
22 of public universities, and is implementing the policy decisions and procedures
23 established by the Regents. UCSC is an institution that receives federal financial
24 assistance and is subject to the requirements of Title IX of the Education
25 Amendments of 1972, 20 U.S.C § 1681.

JURISDICTION AND VENUE

7. This Court has federal question jurisdiction pursuant to Article III, §2 of the United States Constitution and 28 U.S.C § 1331 for claims arising under Title IX of the Education Amendments of 1972, 20 U.S.C § 1681.

8. This Court has personal jurisdiction over Defendant on the grounds that the University is conducting business in the State of California.

9. Venue for this action properly lies in this district pursuant to 28 U.S.C. § 193, because a substantial part of the events or omission giving rise to the claim occurred in the Northern District of California.

I: STATEMENT OF FACTS

10. Complainant is a PhD student at UCSC. Plaintiff and Complainant had a date on or about June 16, 2020. Prior to the June 16, 2020 date, the couple agreed that they would not engage in vaginal intercourse during this date. Plaintiff agreed to cook dinner for Complainant at his apartment. Plaintiff asked Complainant to bring a bottle of wine. Instead of bringing “a bottle of wine” to the dinner, Complainant on her own initiative decided to bring three bottles of wine to the meal. According to Complainant, over the course of the evening she and Plaintiff they drank 3 ½ bottles of wine. (Ex. 1, p. 7)¹

11. At some point after Plaintiff and Complainant started dinner, the couple stopped eating the meal, went into Plaintiff’s bedroom and engaged in consensual oral sex. After a period of time, the pair returned to the dinner table and resumed eating the meal and drinking more wine. Shortly after the couple resumed their meal,

¹ Plaintiff has filed a Motion to Seal Exhibits 1-16, as they contain sensitive personal information of a sexual nature that is confidential pursuant to Title IX procedures.

1 they were joined at the table by Plaintiff's roommate, and the three adults talked
2 about their studies while continuing to drink more wine.

3 12. After about half an hour of chatting with Plaintiff's roommate and
4 continuing to drink wine, Complainant suggested to Plaintiff that they return to his
5 bedroom. Plaintiff and Complainant returned to the bedroom and immediately began
6 taking off their clothes, kissing and engaging in oral sex. While they were kissing,
7 the couple was also "grinding" on each other, meaning they were rubbing their
8 pelvises together. The couple also engaged in consensual digital penetration where
9 Plaintiff was digitally penetrating Complainant's vagina while she was on her hands
10 and knees on his bed facing away from him. Eventually, the couple went to sleep.
11 During the entire encounter, Plaintiff was unable to maintain a full erection due to his
12 alcohol consumption. (Ex. 1, p. 19.) Complainant never blacked out and never lost
13 any memory from the evening. (Ex. 1, p. 6.)

14 13. The following morning, Plaintiff advised Complainant that she should
15 take "Plan B" birth control. According to Complainant, Plaintiff told her that they
16 had "sex" during their encounter the previous night and Plaintiff also told her that "I
17 came in you." Complainant did not believe that they had vaginal intercourse the
18 previous evening, as she had engaged in vaginal intercourse on previous occasions,
19 knew what it felt like and did not experience that sensation during her encounter with
20 Plaintiff. Complainant later told campus investigators that did not notice any
21 secretions of semen when she went to the bathroom following her sexual encounter
22 with Plaintiff. Complainant also told campus investigators that she assumed that
23 when Plaintiff said that they had "sex" the previous evening, he meant vaginal
24 intercourse. While Complainant never felt or saw Plaintiff's penis in her vagina, she
25

1 assumed that the “sex” occurred while the couple was engaging in consensual digital
2 penetration and while she was facing away from Plaintiff. (Ex. 1, P. 9.)

3 14. Plaintiff told campus investigators that he did not engage in non-
4 consensual vaginal intercourse with Complainant. (Ex.1, P. 20.) Plaintiff also told
5 investigators that while the couple were kissing and “grinding”, he thought he might
6 have had a premature ejaculation and was concerned that Complainant could become
7 pregnant from semen on her thigh near her vaginal canal. It was due to this concern
8 that Plaintiff recommended that Complainant take Plan B birth control the following
9 morning. (Ex. 1, p. 21.)

10 **II: PROCEDURAL HISTORY**

11 15. On July 11, 2020, three weeks after the dinner date, Complainant
12 reported to UCSC’s campus sexual assault and harassment investigation office
13 (“Title IX Office”) that Plaintiff had engaged in nonconsensual vaginal intercourse
14 with her on June 16, 2020, and that she would like to pursue a formal investigation.²

15 16. On July 22, 2020, the Title IX Office notified Plaintiff by email that
16 they were investigating an alleged violation of UC’s Sexual Violence and Sexual
17 Harassment Policy (SVSH policy), based on his encounter with Complainant on June
18 16, 2020. (Exhibit 2, Notice of Investigation, to be filed under seal.) The notice
19 informed Plaintiff that the procedures for investigating and resolving the allegation
20 were contained in the 2019 edition of U.C.’s Policies Applying to Campus Activities,
21 Organizations, and Students (PACAOS) Appendix-E (“2019 Appendix-E”). The
22
23

24 ² Plaintiff requested a copy of the Title IX Office’s July 11, 2020 intake report of their
25 interview with Complainant, but has been informed that this report is not a part of his
investigation file and therefore he is not entitled to a copy of it. (See, Ex. 8 and 9.)

1 Title IX Office's July 22, 2020 notification email included a link to Appendix-E.
2 (Exhibit 21, 2019 Appendix-E.) (See, Ex. 24, SVSH Policy.)

3 17. Sana Amini, an investigator with UCSC's Title IX office, interviewed
4 Complainant on August 3, 13 and October 1, 2020. Ms. Amini interviewed Plaintiff
5 on September 10 and October 8, 2020. (Ex.1, p. 1.)

6 18. Respondent did not have an advisor or an attorney during the
7 investigation.

8 19. Various witnesses were also interviewed in the course of the
9 investigation. Other than Complainant and Plaintiff, only Plaintiff's roommate had
10 any direct interaction with the couple on the evening in question. Five of witnesses
11 interviewed were friends of Complainant, who had no personal knowledge of
12 Plaintiff and Complainant's interactions on June 16, 2020, and for the most part
13 simply repeated to Investigator Amini what Complainant had told them about her
14 encounter with Plaintiff. (Ex. 1, p. 2, and table contained therein.)

15 20. During her investigation, Ms. Amini also reviewed text messages
16 between Plaintiff and Complainant prior to and after their June 16, 2020 encounter,
17 as well as some receipts from Complainant and responses by Complainant and
18 Plaintiff after reviewing the evidence. (Ex. 1, p. 3, and Appendix A thereto, Ex. 3.)

19 21. Investigator Amini issued a report on her findings and preliminary
20 determinations on December 1, 2020. In this report, Investigator Amini concluded
21 that, while Plaintiff stated that he did not penetrate Complainant's vagina with his
22 penis, and that Complainant did not feel or see Plaintiff penetrate her vagina with his
23 penis, Plaintiff's suggestion that Complainant take Plan B in morning following their
24 June 16, 2020 encounter, supported a finding, by a preponderance of the evidence,
25 that non-consensual vaginal intercourse had in fact occurred. (Ex.1, P. 45-47.)

Investigator Amini further found Plaintiff's violation of the SVSH Policy on June 16, 2020 was aggravated, in that Plaintiff allegedly used force against Complainant to accomplish the alleged penetration. However, in another section, Ms. Amini's report also states that she found that Plaintiff did *not* use force during the encounter. (Ex. 1, p. 48, 49.) Investigator Amini issued her report on December 1, 2020.

22. On December 1, 2020, the Title IX Office sent Plaintiff a Notice of Outcome informing him of the result of the investigation. (Ex. 4, filed under seal.) The Notice informed Plaintiff that the investigation and report made the preliminary determination that as a result of the June 16, 2020 encounter with Complainant, he violated UCSC's SVSH Policy Section II.B.1.a, Sexual Assault – Penetration. The Notice also stated that the investigation determined that during his encounter with Complainant, Plaintiff also violated UCSC's Code of Student Conduct sections 102.02, 102.08(c), and 102.26.³ The Notice informed Plaintiff that the Student Conduct Office would notify him of the proposed sanction based on the violations no later than 5:00 P.M. on January 5, 2021, and assigned UCSC Student Conduct Officer Julie Oberts to Plaintiff's matter. (Ex. 4, p. 2)

23. On December 29, 2020 Plaintiff requested a Fact-Finding Hearing into Complainant's allegations and the Title IX Office's preliminary determinations as provided in the procedures listed in 2019 Appendix-E. (Ex. 6, email requesting hearing and response.)

³ §102.02 Other forms of dishonesty including but not limited to fabricating information, furnishing false information, or reporting a false emergency to the University, §102.08(c) Conduct which constitutes, physical abuse including but not limited to: (c) other conduct that threatens the health or safety of any person; §102.26 Violation of the University of California Policy on Sexual Violence and Sexual Harassment.

1 24. On January 8, 2021, Ms. Oberts emailed Plaintiff a Notice of Proposed
2 Sanction recommending his dismissal from the University, stayed, with a three-year
3 suspension as a proposed sanction for the violations found in the Title IX Office's
4 December 1, 2020 report. (Ex.5, p. 1, and Ex. 24, UC SVSH Policy.)

5 25. On January 29, 2021, Plaintiff's newly retained counsel Peter Leeming
6 emailed a letter to Linda Skemer, the UCSC Hearing Officer assigned to preside over
7 Plaintiff's Fact-Finding Hearing. In this letter, Mr. Leeming requested clarification
8 of the procedures applicable to the upcoming Fact-Finding Hearing. (Ex. 7.) The
9 letter noted that the new DOE Title IX rules, 34 CFR part 106, had increased
10 procedural protections for all parties at Fact Finding Hearings. These new
11 protections included the right to live cross examination of witnesses by counsel, and
12 Mr. Leeming requested that those new provisions be applied at Plaintiff's Hearing.
13 On February 3, 2021, Hearing Officer Skemer responded to Mr. Leeming's request
14 by stating that the new DOE Title IX rules were not retroactive and that Plaintiff's
15 Hearing would be governed by the existing procedures under 2019 Appendix-E.
16 (See Ex. 8, Skemer response, and Ex. 23, 34 CFR part 106.45.)

17 26. On February 4, 2021, Plaintiff's counsel sent another letter to Hearing
18 Officer Skemer asserting that UCSC's position on applicable hearing procedures
19 denied Plaintiff due process. In this same letter, Plaintiff also requested additional
20 discovery for the Hearing, including the Title IX Office's report of their July 11,
21 2020 Intake interview of Complainant, as well as Witness Interview Summaries used
22 to prepare the investigation report.⁴ (Ex. 9.) Plaintiff's contentions and requests for
23
24

25 ⁴ Witness Interview Summaries are written reports contemporaneously created by the Title IX Office Investigator as they interview a witness.

1 additional discovery were denied by Hearing Coordinator Kyle Sasai on February 3,
2 2021. (Ex. 10.)

3 27. Pursuant to the requirements of Appendix-E, Plaintiff submitted a Pre-
4 Hearing Statement (“Statement”) on March 2, 2021. The Statement included
5 Plaintiff’s list of disputed issues to be addressed at the future Fact-Finding Hearing,
6 Plaintiff’s proposed hearing evidence, and a list of proposed witnesses. One of
7 Plaintiff’s proposed witnesses was Dr. Felice L. Gersh, M.D., a forensic
8 gynecologist, who had reviewed the December 1, 2020 Investigation Report and was
9 prepared to provide expert witness testimony in support of Plaintiff’s explanation of
10 the events of June 16, 2020. (See Ex. 11, Plaintiffs’ Pre-Hearing Statement, and
11 Exhibit 12, Curriculum Vitae of Dr. Felice L. Gersh, M.D.)

12 28. Also pursuant to Appendix-E, a pre-hearing meeting between Plaintiff,
13 his advisor and support person and Hearing Officer Skemer and her staff, was held
14 on March 9, 2021. During that meeting, the participants discussed Fact Finding
15 Hearing procedural questions, Plaintiff’s proposed evidence, and Plaintiff’s proposed
16 witnesses. Plaintiff again requested that his advisors be allowed to take a more active
17 role at the Fact-Finding Hearing, including questioning witnesses.

18 29. During the March 9, 2021 meeting, Hearing Officer Skemer again
19 denied Plaintiff’s request for live cross examination and direct participation by
20 counsel, citing the procedures outlined in Appendix-E.

21 30. On March 19, 2021 Hearing Officer Skemer emailed Plaintiff and his
22 advisors a “Notice of Scope” letter listing the issues, disputed facts, evidence, and
23 witnesses Hearing Officer Skemer found relevant for the hearing. In the Notice of
24 Scope letter, Hearing Office Skemer found that Dr. Gersh’s testimony was not
25

1 relevant to any issue in the case and ruled that Dr. Gersh's testimony would not be
2 admitted at the Fact-Finding Hearing. (Ex. 13, Notice of Scope.)

3 31. The Notice of Scope letter also informed Plaintiff that he had five days
4 to provided additional information about the evidence, including witness testimony,
5 that Plaintiff would like to present at the Fact-Finding Hearing. (Ex. 13, P. 2.) On
6 March 31, 2021 Plaintiff submitted a declaration from Dr. Gersh outlining her
7 proposed testimony and requested that Hearing Officer Skemer reconsider her earlier
8 decision to exclude Dr. Gersh's testimony at the Fact-Finding Hearing. Plaintiff also
9 requested that Dr. Gersh's declaration be admitted into evidence at the Fact-Finding
10 Hearing. (See, Ex.15, Declaration of Felice L. Gersh, M.D.)

11 32. On April 14, 2021, Hearing Officer Skemer sent Plaintiff an email
12 confirming her decision to exclude Dr. Gersh's testimony from the Fact-Finding
13 Hearing. Hearing Officer Skemer also denied Plaintiff's request to admit Dr. Gersh's
14 Declaration into evidence at the Fact-Finding Hearing. (Ex. 16.)

15 33. A Fact-Finding Hearing is now scheduled for June 2, 2021.

16 34. The procedures contained in Appendix-E and similar procedural
17 frameworks have been the subject of criticism and litigation on the grounds that they
18 violate due process, and have in fact been found to violate due process by various
19 state and federal courts.

20 35. In response to DOE's August 2020 Title IX Amendments, Defendant
21 amended Appendix-E on August 14, 2020. The new Appendix-E, effective August
22 14, 2020, purportedly covers campus sexual assault and harassment investigations of
23 incidents that Defendant has decided are not covered by the new DOE Title IX
24 Amendments. However, the new Appendix-E does not contain any of the enhanced
25 due process protections established in the new DOE Title IX Amendments.

1 36. On August 14, 2020, Defendant also released new procedures for
2 investigating campus conduct Defendant decided is covered under the new DOE
3 Title IX rule Amendments, to wit: “University of California Interim PACAOS-
4 Appendix-F: Sexual Violence and Sexual Harassment Student Investigation
5 Framework for DOE-Covered Conduct”. (“Appendix-F”) (Exhibit 22.) Appendix F
6 purports to implement the enhanced procedural protections articulated in 34 CFR part
7 106 to alleged violations of Defendant’s SVSH policy. However, because Appendix-
8 F provides greater due process protections than Appendix-E, “the University will
9 apply the [Appendix-F] only when required, in response to DOE-Covered Conduct. It
10 will follow its existing processes for all other reports.” (Exhibit 24.) Defendant has
11 chosen to narrowly interpret the applicability of Appendix-F to conduct occurring
12 after August 14, 2020, and occurring in a University program or activity. Thus, even
13 after the August 14, 2020 DOE Title IX Amendments, claims of sex-based conduct
14 which occurred prior to August 14, 2020 or not occur in a University program or
15 activity would still be investigated and adjudicated under the provisions of
16 Appendix-E, and not subject to the greater due process protections outlined in
17 Appendix-F.

18 37. Defendant’s approach as described above has established an arbitrary
19 system, where the same conduct can, at Defendant’s sole discretion, result in the
20 application of two different disciplinary tracks, with different procedural rights and
21 potentially different outcomes based on factors having nothing to do with individual
22 culpability, including the date of the alleged occurrence. The application of the
23 Appendix-E procedures to Plaintiff’s case, rather than those granting greater
24 procedural protections under Appendix-F or as required by 34 CFR part 106, is a
25 violation of Plaintiff’s due process rights and therefore unconstitutional.

III: FIRST CAUSE OF ACTION

42 U.S.C. § 1983 – Fifth and Fourteenth Amendments

38. Plaintiff incorporates the foregoing allegations as though fully set forth.

39. 42 U.S.C. § 1983 provides that: “Every person who, under color of [law] subjects . . . any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

40. The Fifth Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, guarantees due process of law. The Fourteenth Amendment prohibits any state from depriving any person of life, liberty, or property without due process of law. The right to procedural due process includes the right to timely notice of the case against oneself and the right to be heard on the matter by a neutral arbiter. Every individual has a cognizable liberty and property interest in his or her professional reputation.

41. Defendant Regents propose to apply the flawed and unconstitutional procedures outlined in Appendix-E, to the Fact-Finding Hearing currently scheduled in Plaintiff’s case. If Plaintiff’s hearing is conducted under the provisions of Appendix-E, he will be unlawfully deprived of the protection he is entitled to under the newly amended DOE Title IX rules articulated in 34 CFR part 106 and as interpreted by established case law.

42. Defendant Regents have also violated Plaintiff’s rights to due process by unreasonably denying his reasonable requests for evidence in their custody and control, including the Witness Interview Summaries of all parties and witnesses interviewed as part of the Title IX Office’s investigation into the June 16, 2020 event,

1 and Complainant's July 11, 2020 Initial Intake Report, where she gave the Title IX
2 Office her initial statement about her encounter with Plaintiff on June 16, 2020.
3 Defendant Regents have also denied Plaintiff's due process right to present relevant
4 and exculpatory evidence at the upcoming Fact-Finding Hearing by refusing to allow
5 the expert-witness testimony of Dr. Gersh or even her sworn declaration into
6 evidence at the Hearing.

7 43. Defendant Regents' proposed sanction for Plaintiff's alleged conduct in
8 this case is dismissal from the University, to be stayed, with a three-year suspension.
9 To impose such a serious sanction using a flawed and unfair process is clear
10 deprivation of Plaintiff's liberty and property interests protected under the Fifth and
11 Fourteenth Amendments.

12 44. Defendant Regents' decision to withhold the full due process
13 protections set forth in 34 CFR part 106 from Plaintiff's up-coming Fact-Finding
14 Hearing violates Title IX of the Education Amendments of 1972 and the
15 corresponding Title IX Rules promulgated by DOE, as well as the Due Process and
16 Equal Protection provisions of the United States Constitution.

17
18 **IV: PRAYER FOR RELIEF**

19 Wherefore, Plaintiff requests that the Court enter judgment in his favor against
20 Defendant, and award the following relief:

21 A: Declare that the application of Appendix-E to Plaintiff's upcoming
22 hearing violates Title IX of the Education Amendment Amendments of 1972 as
23 amended by 34 CFR part 106;
24
25

1 B. Declare that the application of Appendix-E to Plaintiff's upcoming
2 hearing violates the Due Process Clause of the Fifth Amendment to the United States
3 Constitution, as applied to the states by the Fourteenth Amendment;

4 C. Declare that Defendant's refusal to provide evidence in their custody
5 and control to Plaintiff to allow him to fully prepare for the up-coming Fact-Finding
6 Hearing, violates the Due Process Clause of the Fifth Amendment to the United
7 States Constitution, as applied to the states by the Fourteenth Amendment;

8 D. Declare that Defendant's refusal to allow Plaintiff to introduce relevant
9 and exculpatory evidence, in the form of Dr. Gersh's expert-witness testimony and/or
10 her sworn declaration regarding her review of the evidence and opinions thereof,
11 violates the Due Process Clause of the Fifth Amendment to the United States
12 Constitution, as applied to the states by the Fourteenth Amendment;

13 E. Permanently enjoin Defendant and its officers, agents, servants,
14 employees and attorneys, and those persons in active concert with them from
15 applying Appendix-E policy to Plaintiff's pending matter;

16 F. Order Defendant to allow Plaintiff to offer into evidence at his Fact
17 Finding Hearing the expert-witness testimony of Dr. Felice L. Gersh as well as her
18 sworn declaration regarding her review of the evidence in this case and opinions
19 thereof;

20 G. Award Plaintiff his reasonable costs and attorneys' fees in this action;
21 and

22 H. Grant Plaintiff such other relief as this Court may deem just and proper.

23 ///

24 ///

1 Respectfully submitted

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3 Dated: May 4, 2021

By: _____s_____
Peter A. Leeming
Attorneys for John Doe

4
5 Dated: May 4, 2021

By: _____s_____
Frank R. Ubhaus
Attorneys for John Doe

6
7 Dated: May 4, 2021

By: _____s_____
James V. Kosnett
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